IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, Plaintiffs in Error, vs. CYRUS A. MENTZER, Defendant in Error.	No. 2298

Upon Writ of Error to the United States District Court of the Western District of Washington Southern Division

Brief of Appellant

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STATEMENT OF THE CASE.

Action brought by plaintiff to recover $3,330, alleged value of planing mill and the machinery and lumber located near South Tacoma, Washington, and adjacent to the right of way of the Northern Pacific Railway Company, on allegations of negligence to effect as follows:

That on the 15th day of July, 1911, while the trains of the defendants were running upon the railway of the Northern Pacific Company and passing the property of plaintiff, one of the loco-

motives of the defendants was so carelessly and negligently constructed, and so carelessly and negligently operated that sparks were emitted therefrom, which, falling upon and about the building in which the greater portion of the property of plaintiff was located, set fire to said building and property, which fire spread upon and over the property of plaintiff and consumed the same.

That the injury to plaintiff was by reason of the negligent construction of the engines of the defendants and the carelessness and negligence of the servants and agents of the defendants in operating the same and in starting the fire and permitting it to burn the property (printed transcript, pp. 4-5).

It was also alleged that the two defendants were both operating trains over the same track; which track belonged to the Northern Pacific Railway Company (printed transcript, p. 4).

The defendants filed separate answers (printed transcript, pp. 5-7). Both defendants denied having caused the fire and each denied that it was guilty of any negligence whatever either in the construction of the locomotives or in their operation.

Upon trial a verdict was rendered against both

defendants in the sum of $3,120 (printed transcript, p. 8).

At the same time the general verdict was rendered the jury made a special finding upon a special interrogatory submitted by the court, as follows:

"Q. If your verdict is in favor of plaintiff state whether the fire was started by sparks from the engine drawing Northern Pacific passenger train 301, or the engines of Northern Pacific freight train 680, or the engine of the O.-W. R. & N. freight train 691."

"A. Fire was started by sparks from engine of the O.-W. R. & N. freight train 691."

(Printed transcript, p. 8.)

Motion for a new trial was filed by the O.-W. R. & N. Co., which motion was, after argument, overruled by the court (printed transcript, pp. 122-127).

Final judgment was entered on the 16th day of June, 1913 (printed transcript, p. 9).

Bill of exceptions was duly settled on the 21st day of July, 1913 (printed transcript, pp. 129 to 139, and the bill of exceptions as a whole is from p. 10 to p. 129, printed transcript).

At the beginning of the trial it was stipulated that the block sheets of the two defendants should be considered in evidence showing the running time

of the trains on the 15th day of July, 1911. That train 691, O.-W. R. & N. Co., was a freight train, and that train 301, N. P. R. Co., was a passenger train, and train 680, N. P., was a freight train and was a double-header, propelled by two engines. That trains 691, O.-W. freight train, and 301 N. P. passenger train, were leaving South Tacoma for Portland, going south, and train 680 N. P. was coming from Portland, running north.

It was also stipulated that the O.-W. R. & N. Co. was running its trains over the trackage of the N. P. R. Co. between Tacoma and Portland under lease with the latter road—a trackage agreement, the property being owned by the N. P. R. Co. (printed transcript, p. 11).

The testimony of all of plaintiff's witnesses who testified as to seeing any of the trains passing South Tacoma identified the train of the O.-W. R. & N. Co. as the one referred to in the stipulation, and the train of the N. P. R. Co. as the passenger train referred to in the stipulation, leaving South Tacoma for Portland, and all of plaintiff's testimony was directed to showing that one or both of the engines of these trains emitted the sparks plaintiff claimed caused the fire. No testimony was introduced by plaintiff as to the N. P. freight train

moving from Portland to Tacoma, running north.

The number of the engine of the O.-W. R. & N. Co. was 527.

The number of the engine on N. P. passenger train was 2107.

During the taking of testimony witness for plaintiff, John Horn, was permitted against the objections of each of the defendants to testify that he had seen other fires in this immediate neighborhood started by sparks of the engines of the defendants at or within thirty days prior to the burning of the mill, and was permitted against the objections of each of the defendants to state the circumstances of such fire (printed transcript, pp. 15-18).

The court also permitted other witnesses to testify against the objection of the defendants, on behalf of plaintiff as to other fires within thirty days prior to July 15, 1911.

Testimony of Anna D. McCarthy (printed transcript, pp. 24-25).

Testimony of J. D. Banker (printed transcript, pp. 28-32).

Testimony of H. S. Savage (printed transcript, pp. 32-34).

All this class of testimony was objected to by the defendants by specific objections which will be given hereafter. Defendants also raised objections to this testimony by asking the court to instruct the jury to disregard this testimony in the consideration of the case (printed transcript, p. 135).

The block sheet referred to in the stipulation discloses that O.-W. R. & N. Co.'s train 691 passed South Tacoma station at 1:43 A. M., and the N. P. pasenger 301 passed South Tacoma at 1:57 A. M. There was no dispute as to the hour when the trains passed South Tacoma depot. The property burned was situated down one-third of a mile south from the depot.

Plaintiff introduced testimony of various witnesses, which will be referred to hereafter, in support of the allegations of his complaint, and the defendants, and each of them, introduced testimony to disprove the allegations of plaintiff's complaint, and showed affirmatively by uncontradicted testimony that there was not any negligence in the operation of the trains or of the engines, spark arresters, fire apparatus, etc., nor was there any negligence in construction, and that the engine of each of the companies and its spark arrester, fire apparatus, etc., were in perfect repair and condition and that

their respective engines were all modern, up-to-date engines with the most perfect spark arresters, fire apparatus, etc., in existence, for the prevention of escaping sparks. This was particularly so of the defendant O.-W. R. & N. Co.—the defendant whose engine the jury found caused the fire.

The plaintiff did not introduce any evidence either in chief or rebuttal to disprove these facts.

At the close of the testimony the defendant O.-W. R. & N. Co. moved the court to direct a verdict in its favor upon the grounds that the evidence was insufficient to justify a verdict against it; that there was not sufficient testimony showing that the company was guilty of any negligence in the operation of its engines or that its engines were negligently constructed or equipped; that there was no sufficient evidence to show that any fire was started by reason of any sparks emitted by its engine; that the plaintiff having sued upon a joint cause of action alleged against both defendants and having proved, if he had proved anything, a separate act of each defendant was not entitled to maintain the action (printed transcript, pp. 97-134).

The N. P. Ry. Co. made an identical motion upon its behalf.

Each of these motions were overruled by the

court and each defendant excepted separately and the exceptions were allowed (printed transcript, p. 97).

The defendant O.-W. R. & N. Co. at the proper time asked for certain written instructions (printed transcript, pp. 98-104). The court refused to give instructions 15, 16, 17, 18 and 19 asked for by said defendant. These instructions asked for and refused were as follows:

15.

"There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants or either of them. You will, therefore, disregard this testimony in your consideration of the case."

16.

"While the jury can not find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire."

17.

"The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company or the passenger train of the Northern Pacific Railway Company."

18.

"You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 A. M. then your verdict must be for the defendants."

19.

"If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 A. M. July 15, 1911, then your verdict must be for the defendants."

To the refusal of the court to give these instructions each of the defendants separately excepted and the exceptions were allowed (printed transcript, pp. 104-106).

Among others the court gave the following instructions:

"It will be your first duty to determine whether or not the mill was burned from sparks emitted by one of these engines, that is, one of the engines of one of the defendant companies."

To the giving of which each of the defendants

separately excepted and the exceptions were allowed.

The court also gave the following instruction:

"If you find that there is a fair preponderance of the evidence showing that it was set on fire and burned down by the sparks emitted from the engines of one of these companies."

The defendants also made separate objections to the charge of the court in submitting the question of fires being started by separate engines of the defendants to the jury on the ground that such instructions were not in accordance with the pleadings and issues in the case. These exceptions were allowed.

Exceptions to the other instructions above excepted to were also for this reason. Otherwise the defendants took no exceptions to the charge of the court, as actually given (printed transcript, pp. 120-121).

Defendant O.-W. R. & N. Co. filed a petition for new trial on the ground of the insufficiency of the evidence to justify the verdict; errors of law occurring at the trial; newly discovered evidence; and that the verdict was contrary to the evidence; said defendant assigning as errors of law all of the matters and things occurring in the progress of the trial to which exceptions were taken by the defendants, as hereinbefore set forth.

Defendant also asked that a new trial be granted because the principal witness for plaintiff, one Ebert, had in a subsequent case involving the same state of facts testified differently to material matters than he had at the trial of this cause (printed transcript, pp. 122-127). This motion was overruled and defendant O.-W. R. & N. Co. excepted and the exceptions were allowed.

Assignment of Errors; printed transcript, pp. 129-139; Writ of Error duly issued; printed transcript, pp. 146-147; Citation issued and served; printed transcript, p. 149.

SPECIFICATION OF ERRORS.

ONE.

The court erred in permitting the witness, John Horn, for plaintiff, to answer the following question propounded by plaintiff's attorneys, notwithstanding the objections of the separate defendants:

"State whether or not you ever saw any other fires in this immediate neighborhood set by sparks of the engines of the defendants Northern Pacific Railway Company or Oregon-Washington Railroad & Navigation Co. at any time just prior or within thirty days prior to the burning of this mill" (printed transcript, pp. 15-16).

The witness's answer to this question was, "Yes, sir."

The court erred in permitting the same witness to answer the following question asked him by plaintiff's attorneys immediately following the preceding question and answer, notwithstanding the objections of each defendant:

"State the circumstances under which that fire occurred."

The answer of the witness was as follows:

"I have seen several. There was one set about thirty yards from the mill and it was running pretty close to the fence where a private family was living, and I went over there and helped put it out, and also put one out right in the mill yard, close to the mill, probably four or five days before. This other happened probably a couple of weeks before" (printed transcript, pp. 17-18).

On cross-examination witness Horn testified that he was one of the firm of Horn Brothers, who owned and operated a shingle mill in the building, and that he had a suit against these same companies to collect for the loss of the shingle mill, but that this suit had been terminated.

That he did not remember the dates when he saw the fires, preceding the day of the burning of the mill, that it might have been two weeks before.

That one of the fires the railroad men and he

went over and put out. That fire was started from a freight engine. That the sparks were going out of this freight engine and the grass was pretty dry. That he did not know what company the freight engine belonged to, but that he thought it was an Oregon-Washington. That he did not know for certain whether it was or not.

That he did not know whether it was a Northern Pacific train. And when asked if it could have been a Great Northern train he said he did not know. That he knew that the Great Northern operated its trains over the same track.

He was then asked if he had seen sparks come out of the engines of all of these three different roads. He answered that he did not remember; that he did not pay attention.

That there was a grade at or near the mill to the south and that when a train started up it would sometimes puff pretty hard. That this was when he saw sparks coming out of some smokestacks. That the grass was very dry where the sparks alighted and they started fires. That this was about two weeks before the burning of the mill. That the next fire he saw prior to the burning of the mill property was close to the mill property, in the yard.

That this was two or three days before the mill was destroyed. That he saw this fire when it was probably a yard square. That he did not know that he saw this fire started by an engine. That he saw the engine pass, hauling a freight train. That he did not remember what company it belonged to. That he did not know as he looked. That he did not know whether the Northern Pacific, Great Northern or Oregon-Washington Railroad & Navigation Company were operating this train or engine (printed transcript, pp. 18-19).

TWO.

The court erred in permitting Anna D. McCarthey to answer, over objections of each of the defendants, the following question propounded by plaintiff's attorneys:

"Now state to the jury whether or not you ever saw any other fires set by the Oregon-Washington, and the Northern Pacific Railway engines in this immediate vicinity and within about thirty days prior to the happening of this fire."

The answer to this question was as follows:

"Yes, every few days I would see fires but they did not amount to much because it was either put out by enginemen themselves or section men, or the neighbors would use their hose and put them out along where I lived" (printed transcript, pp. 24-25).

THREE.

The court erred in permitting the witness J. D. Banker to answer over objections by each of the defendants, the following question, propounded by plaintiff's attorneys:

"State whether or not at any time prior to the 15th of July, 1911, and within thirty days prior thereto, you ever saw any fires set along the tracks in this vicinity by sparks emitted from the engines of the Northern Pacific or Oregon-Washington Railroads" (printed transcript, p. 28).

The witness answered:

"I saw several grass fires started."

FOUR.

Then witness was asked the following question:

"Did you ever see any sparks emitted from the engines of these companies about that time?"

"Witness answered, yes, sir. On one particular instance I was at the mill to see Mr. Horn and a train went by and scattered considerable fire while we were on the platform; quite a lot. That at this time he and Mr. Horn were on the far side of the mill from the track; on the east side of the mill. That sparks came over the mill and settled down all around them" (printed transcript, pp. 30-31).

The court erred in permitting the last above question and answer. Before the giving of the

answer, however, the plaintiff's attorney amended the question by stating that he would limit it to thirty days prior to the fire.

On cross-examination the witness testified that he supposed it was fifteen or twenty days that this occurrence happened before the fire that burned the mill. That the fire was started from the engine of a pretty heavy freight train. That the engine was working hard with it; that it had to get up lots of smoke. That it was somewhat upgrade going south. The engine would be required to work pretty hard if it stopped at the station and then started up the grade with a heavy train.

He also stated that he did not know what company's train it was; whether the Northern Pacific, the Great Northern or Oregon-Washington or what —could not say which. That the sparks at that time did not start any fire (printed transcript, p. 31).

FIVE.

The court erred in permitting the witness Savage to answer, over objection by each of the defendants, the following question propounded by plaintiff's attorneys:

"State whether or not at any time, say within

thirty days, prior to July 15, 1911, at or near the vicinity of this mill, you ever saw any fires set by sparks from the engines of the Northern Pacific or Oregon-Washington Railroads."

The witness answered: "Yes, sir. That he helped put some out" (printed transcript, pp. 32-33).

On cross-examination the witness was asked if he had observed any fires set by engines of the Great Northern Company. He answered as follows:

"I would not say what engines they were, but I saw several fires started from engines. That he did not know whether it was the engines of the Northern Pacific, the Oregon-Washington or Great Northern. That he would not say which it was. That it was very dry time and everything was highly inflammable" (printed transcript, pp. 33-34).

SIX.

The court erred in not granting the motion of the defendant O.-W. R. & N. Co. for a directed verdict (printed transcript 97).

SEVEN.

The court erred in not granting the motion of the defendant N. P. Ry. Co. for a directed verdict (printed transcript, p. 97).

EIGHT.

The court erred in refusing to give instruction 15 asked for by defendant O.-W. R. & N. Co., which instruction reads as follows:

"There was some evidence introduced by plaintiff as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned. The court instructs you that this evidence is too indefinite and uncertain to constitute any proof against the defendants, or either of them. You will, therefore, disregard this testimony in your consideration of the case" (printed transcript, p. 103).

NINE.

The court erred in refusing to give instruction 16 asked for by the defendant O.-W. R. & N. Co., which instruction reads as follows:

"While the jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire" (printed transcript, p. 103).

fore it took fire. The particular engines were not identified, but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire; and it seems to us, that under the circumstances, this probability was strengthened by the fact, that some engines of the same defendant, at other times during the same season, had scattered fire during their passage."

In the case at bar the specific engine of the O.-W. R. & N. Co. was identified, as was, also, the engine of the N. P. Ry. Co.

Again, even if this testimony was admissible as to other fires caused by the engines of the defendant O.-W. R. & N. Co. and of other fires caused by the engines of the N. P. Ry. Co. the questions and answers would be required to be limited to fires caused by the engines of each one of these companies separately. The testimony in the case at bar was simply that the engines of the O.-W. R. & N. Co. and the engine of the N. P. Ry. Co. set other fires within thirty days prior to the destruction of plaintiff's property. The testimony did not show that the O.-W. R. & N. Co.'s engines set fires or that the N. P. Ry. Co.'s engines set fires, but that one or the other did, and in all instances this list of engines that might have set fires included the engines of the Great Northern Railway Co. Surely it was no evidence against the

O.-W. R. & N. Co. that the N. P. or the Great Northern engines may have set fires, nor was it any evidence against the N. P. Ry. Co. that the Oregon-Washington or Great Northern companies' engines may have set fires.

THREE.

Instruction as to Other Fires, Refused.

Upon this question of other fires, because of its intimate connection with the matter discussed in point two, we will here present error No. 8 in specification of errors. This is an instruction asked for by the defendant O.-W. R. & N. Co. and refused by the court (printed transcript 103-104).

By this requested instruction the court was asked to withdraw from the jury the testimony as to fires originating in the vicinity by sparks from engines within thirty days prior to the date when plaintiff's property was burned.

This instruction, we believe, should have been given for the reasons and upon the authorities stated in point two, above.

It should also have been given for the reason that upon cross examination the various witnesses testifying as to previous fires clearly disclosed that

they did not know to what company the engines belonged, that set the previous fires (testimony of John Horn, printed transcript, pp. 18-19; testimony of Anna D. McCarthey, printed transcript, p. 27; testimony of J. D. Banker, printed transcript, p. 31; testimony of H. S. Savage, printed transcript, p. 33).

All of these witnesses, except Anna D. McCarthey, testified that they did not know whether the previous fires were started by the defendant N. P. Ry. Co. or O.-W. R. & N. Co., or the Great Northern Ry. Co.

So far as Mrs. McCarthey's testimony is concerned, she only testified generally that she had seen fires every few days, but they did not amount to much because it was either put out by the enginemen or the section men or the neighbors (printed transcript, p. 25).

On cross-examination she reiterated this testimony (printed transcript, p. 27). She did not undertake to testify that these fires were caused by the engines of any particular company.

In view of the fact that it was admitted that the Great Northern Railway Co. operated its trains over this same track, if all other objections to the testi-

mony and to the refusal of the court to give the instruction referred to, it would seem clear that under no circumstance should testimony go to the jury as to fires that may have been set by the Great Northern Railway Co.

Also the defendant O.-W. R. & N. Co. should not be compelled to pay damages upon testimony that shows that these previous fires may have been fires started from engines of the N. P. Ry. Co.

As this matter went to the jury, under the testimony and instructions of the court, the jury had the liberty to find negligence upon the part of the defendant O.-W. R. & N. Co. because the engines of the defendant N. P. Ry. Co. or the engines of the Great Northern had previously within thirty days prior to the burning of the property set various fires in the vicinity.

FOUR.

Insufficiency of the Evidence.

The court should have granted the motion of the defendant O.-W. R. & N. Co. for a directed verdict.

A. For the reason that the evidence was insufficient to justify a verdict against it.

B. That the testimony did not show that said defendant company was guilty of any negligence or that its engines were negligently constructed or equipped.

C. That there was no evidence to show that any fires were started by reason of any sparks emitted by said defendants' engines.

D. Plaintiff having sued upon a joint cause of action, alleged against both defendants, and having proved, if he had proved anything, a separate act of each defendant, was not entitled to maintain the action (printed transcript, p. 97).

The admitted facts showed that the O.-W. freight train departed from South Tacoma at 1:43 A. M. and the N. P. passenger train departed from South Tacoma at 1:57 A. M. (see schedule, Exhibit A). Thus the N. P. train was fourteen minutes later passing the burned premises than the O.-W. freight.

Train 680 was an N. P. double-header freight train, going from Portland to Tacoma and passed Lake View, a station just beyond South Tacoma, at 3:25 A. M. and arrived at South Tacoma station at 3:35 A. M. (see plaintiff's exhibit A, schedule of trains; Gillman's testimony, printed transcript, p.

44; Portrude's testimony, printed transcript, pp. 71-72).

The testimony as to the engines of the aforesaid trains of the O.-W. R. & N. Co. and the N. P. Ry. Co. throwing sparks previous to fire was in effect, as follows:

Wm. Ebert, for plaintiff, testified that he saw trains pass the mill the night of the fire, going toward Portland, one was a freight and one was a passenger. Both of them threw up sparks. There were quite a few sparks the size of a dime. These were going in the direction of the mill. That ten or fifteen minutes after the freight train passed the passenger train passed. That the passenger train was throwing up sparks and the freight train was apparently pulling pretty hard. That it was about fifteen or twenty minutes after these trains went by that he first saw the fire at the mill. That he did not turn in any fire alarm (printed transcript, pp. 34-35).

On cross-examination he testified that he was ninety to one hundred feet east and south of the mill, a street running between the mill and the house where he was. That he went to bed that evening about nine o'clock and waked up a number of times during the night. That he happened to see

the freight train because he had to get up and go to the closet and heard the train coming and looked out the window. The train was down towards the depot, three and a half to four blocks from the mill. That he watched it probably two minutes till the train came up to the end of the mill; saw it throwing sparks all the way along, about the size of a dime. He thought a dime was about the size of the top of the finger or finger nail. That the sparks looked about the size of a dime when the engine was three or four blocks away and that he could tell that they were larger than the end of a lead pencil. That they were larger than that. That he did not pay much attention to whether the sparks were the size of a dime or not but they looked to be. He was sure they were bigger than a lead pencil. That he could not tell the number of sparks that were larger than a lead pencil, but there were quite a few; lots of sparks coming out of the engine and the engine was working hard. That he was not particularly interested in the number of sparks it was throwing out or in the size of the sparks. That then he went down to the toilet in the house—downstairs. The passenger train did not go by until he came back upstairs. He went back to the bedroom before he saw the passenger train. That the passenger was about a

block and a half or two blocks from the mill when he first saw it. That the engine was throwing a few sparks. That they did not appear to be as big as the sparks from the freight (O.-W. R. & N. train), and there was not as many as from the freight. These sparks were not as large as a five cent piece. Some of them were as big as the end of a lead pencil. He did not pay any particular attention to this. That after the passenger train (N. P.) went by he went back down to the toilet and then came back up and after that laid down and presumed he went to sleep. He judged he was asleep or in a drowse fifteen or twenty minutes. He fixed the time because he thought of going down to the toilet again, but never looked at any timepiece. That he got up—then was when he first saw the fire. That he called the other boys and they got up and came to the window and looked out (printed transcript, pp. 35-37).

This was all the testimony there was on behalf of plaintiff as to the engines of either of the defendant companies throwing sparks.

This, in our opinion, was not sufficient evidence to go to the jury for the purpose of showing that the engine of the defendant company, O.-W. R. & N. Co., was not in repair or that it was negligently

operated or constructed.

Again, this testimony affirmatively shows that there was another agency that might have caused the fire, namely, the engine of the defendant N. P. Ry. Co., which passed the place fourteen minutes later than the O.-W. R. & N. Co.'s train. This N. P. engine was also throwing sparks. Testimony as to this was by the same witness who testified to the engine of the O.-W. R. & N. Co.'s train throwing sparks.

The undisputed testimony on behalf of plaintiff, as well as of some of defendant's witnesses, disclosed that the mill building in which plaintiff's property was situated was an open building—that is, was constructed, a very large portion of it, so there were no walls on the side, and any one could enter the building at any time, and there was opportunity for the fire to have been started by an incendiary or by carelessness. The building was situated along the line of the main thoroughfare of an extensively used railroad.

The only other evidence for plaintiff related equally to the indiscriminate starting of previous fires from the engines of the O.-W. R. & N. Co., the N. P. Ry. Co. and the Great Northern Ry. Co. without showing that the engines of any one of the com-

panies started the fire. This testimony has already been fully referred to. And even if this testimony was admissible, and the lower court was justified in refusing to give the instruction asked for by defendant O.-W. R. & N. Co. to disregard this testimony, it would not be sufficient to make a case for the defendant in error as against appellant O.-W. R. & N. Co. This evidence did not actually disclose that the defendant O.-W. R. & N. Co. set any of these previous fires, or if it did, it only disclosed that the N. P. Ry. Co. engines were guilty of the same thing and plaintiff would still have had just as perfect a cause of action made out against the N. P. Ry. Co., whose engine passed later than the O.-W. R. & N. engine. In other words plaintiff, under these circumstances, would have completely proved that it was just as reasonable to infer that the N. P. train was the cause of the fire as it was to infer that the O.-W. R. & N. train was the cause of the fire.

The N. P. Ry. Co. offered testimony to show that its fire apparatus, spark arresters, etc. were in perfect order, good condition and properly constructed. Likewise the O.-W. R. & N. Co. proved conclusively that its engine, spark arrester, fire apparatus, etc., were properly constructed and of the

best known type and class, and that it was not out of repair in any particular. This was proved by the inspectors, who had all quit the employ of the company, on account of a strike before this action was begun (testimony of J. A. Donovan, printed transcript, pp. 56-57; testimony of J. A. Driscoll, printed transcript, pp. 72-76; testimony of Fred Zintz, printed transcript, pp. 82-86).

It was also shown by the defendant O.-W. R. & N. Co. that its locomotive was properly operated (testimony of R. W. Wasson, printed transcript, pp. 77-80).

As to the modern character and efficiency of the engine, see also testimony of W. A. Perley (printed transcript, pp. 87-93).

N. P. Ry. Co. also introduce like conclusive proof, but as the jury found the fire was set by the O.-W. R. & N. Co. and the judgment is had against the N. P. Ry. Co. only because it was the owner of the track; it is unnecessary to refer in detail to this testimony.

There was no testimony in rebuttal as to the condition of the engines, their apparatus or of their operation. This testimony standing absolutely uncontradicted was conclusive evidence that the O.-W. R. & N. Co. was not negligent in the operation,

maintenance or construction of its engine or in its fire apparatus, spark arrester, etc., connected therewith.

The setting of a fire by a passing locomotive raises no legal presumption that it was the result of negligence.

Even though there might be some evidence of negligence, positive and uncontradicted testimony that the spark arrester was the most approved in general use and was in good condition and repair is conclusive.

Lake Erie & W. R. Co. vs. Gossart, 42 N. E. 818 (Ind.).

The court at page 819 says:

"The mere setting of a fire by a passing locomotive raises no legal presumption that it was the result of negligence. * * * The burden is cast upon the party seeking to recover damages for any injury therefrom to prove more than the mere escaping of fire to show actionable negligence on the part of the railroad company."

Again, at page 820, the court says:

"Counsel for appellee insists that because a witness testified that sparks large enough to be carried sixty-eight feet, the distance from the appellant's railroad to the point where the fire started, and remain alive so as to set fire to dry grass, weeds, etc., could not escape from appellant's engine, except the spark arrester was out of repair,

from this evidence the jury had a right to infer that the spark arrester was out of repair, although there was positive evidence, uncontradicted, that the spark arrester on this engine was in good condition and repair. Counsel forget that there is no proof that the fire originated from appellant's engine, except the fact that the witness testified that a few minues before the engine which it is claimed set the fire passed over appellant's road, he passed the place where the fire started and saw no fire; that after he had proceeded on his way a quarter of a mile the train overtook him and at that point he noticed sparks escaping. Under the adjudications in this state, above cited, this evidence alone is insufficient to prove negligence on the part of the appellant. On the other hand the evidence shows clearly that the spark arrester was the most approved in general use and was in good condition and repair. It is true that it is the province of juries to draw inferences of fact from the evidence, but they have no right arbitrarily to infer facts which there is no evidence to support."

Clark vs. Grand Trunk Western Ry. Co., 112 N. W. 1121 (Mich.).

Minneapolis Sash & Door Co. vs. Great Northern Ry. Co., 86 N. W. 451 (Minn.).

Shipman vs. Chicago, B. & Q. Ry. Co., 110 N. W. 535 (Neb.).

Smith vs. Northern Pacific Ry. Co., 53 N. W. 173-174-5 (N. D.).

Bernard vs. Richmond F. & P. R. Co., 8 S. E. 785 (Va.).

White vs. New York Central & H. R. R. Co., 85 N. Y. Sup. 497; affirmed 74 N. E. 1126.

Garrett vs. Southern Ry. Co., 101 Fed. 102.

Woodward et al. vs. Chicago, M. & St. P. Ry. Co., 145 Fed. 577.

Svea Ins. Co. vs. Vicksburg S. & P. Co., 153 Fed. 774-780-1.

Canadian Northern Ry. Co. vs. Senske, 201 Fed. 637 (C. C. A. 8 Circuit).

Thorgrimson vs. N. P. Ry. Co., 64 Wash. 500.

It should be borne in mind that it was not claimed by defendant in error that the fire was started by reason of sparks from engines igniting combustible material on the right of way, so no question of negligence is in this case because of the permitting of the accumulation of inflammable materials on the right of way.

In addition, however, to the situation as above given the defendants in the court below proved by testimony, to an absolute certainty, that the fire was not observed in or upon the building in which plaintiff's property was situated until about 3:50 A. M. at which time the fire alarm was turned in at the central office. There was a fire box situated at 58th and Washington streets, which is across the street from where the building was situated that burned (testimony of McAlevy, Chief of Tacoma Fire Department, printed transcript, pp. 60-61; of Charles Ryan, City Fireman, printed transcript, pp. 63-64; testimony of C. B. Lindsay, policeman, print-

ed transcript, pp. 65-67; testimony of M. D. Guy, policeman, printed transcript, pp. 68-69; testimony of C. B. Sharman, printed transcript, pp. 70-71), makes absolutely certain that the fire was not discovered more than a minute or so prior to 3:50 A. M.

Thus it was more than two hours after the passing of the train of the O.-W. R. & N. Co. before the fire was observed and it was nearly two hours after the passing of the train of the Northern Pacific Ry. Co.

Defendant in error will say that the witnesses for plaintiff placed the time of the discovery of the fire much earlier, but the testimony of these witnesses was merely guessing, perhaps coupled with a desire to aid the case of plaintiff. It is apparent from reading the testimony of these witnesses and the circumstances which they give of the arrival of the fire department that the actual time of the discovery of the fire by them was just about the time, or a minute or two before the time, the fire deparment arrived, and the record testimony of the officially kept fire alarm, discloses the time of the day that it was. This fire occurred July 15, 1911, almost two years before the last trial, and more than one year before the first trial, and plaintiff's

witnesses did not undertake to fix the time of the fire with certainty.

FIVE.

Instruction No. 16, Asked for by Defendant O.-W. R. & &N. Co.

This instruction reads as follows:

"16. The jury cannot find any negligence against either company because of a train of the Northern Pacific Railway Company going north about 3:35 A. M., still the fact that this train did pass this building at that time, or about that time, is a circumstance to be considered by the jury in considering whether or not some other agency than that of the Oregon-Washington Railroad & Navigation Company's freight train or the Northern Pacific Railway Company's passenger train caused the fire" (printed transcript, p. 105).

The undisputed testimony showed that this Northern Pacific train did pass this building about the time stated; that it was a double header, having thirty or more freight cars, and it having passed before the firm alarm was turned in, the instruction, in our opinion, should have been given.

SIX.

We believe that the court should also have given instruction No. 17, which instruction reads as follows:

"17. The fact that this train did pass the premises going north at the time it did is permissible to be considered by you as a circumstance tending to show that the fire might have been started by a train other than the freight train of the Oregon-Washington Railroad & Navigation Company, or the passenger train of the Northern Pacific Railway Company" (printed transcript, p. 105).

We think the jury had a right to consider, from the fact that this Northern Pacific train passed at 3:35 a. m., that the fire might have been started by its agency.

SEVEN.

The court should have given instructions 18 and 19, asked for by the defendant, O-W. R. & N. Co., which instructions read as follows:

"18. You are instructed that if you find that the fire was not discovered by the witnesses until about 3:30 a. m., then your verdict must be for the defendants."

"19. If you believe from the evidence that the fire which destroyed plaintiff's property did not begin until shortly before 3:30 a. m., July 15, 1911, then your verdict must be for the defendants" (printed transcript, pp. 105-106).

Either one or both of these in structions should have been given. If the fire did not start or begin until after 3:30 a. m. the time that elapsed after the train of the O-W. R. & N. Co. passed the building

and the beginning of the fire was so great that plaintiff could not legitimately claim that sparks from the engine of this train started the fire. This view is supported by the Thorgrimson case, 64 Wash., and other cases cited under Point Four.

EIGHT.

The court, not having directed a verdict, should have granted a new trial upon the motion of the defendant O-W. R. & N. Co. for the reason that the evidence was insufficient to justify a verdict against it. Also for the reason that the verdict was contrary to the evidence and that substantial justice required that a new trial be granted, and upon the other grounds therein stated (printed transcript, pp. 122-127). The argument upon this is sufficiently covered in the points heretofore discussed.

NINE.

There appears in the transcript a verdict rendered between these parties in a prior action and the order of the court setting aside the verdict (printed transcript, pp. 7 and 8). These are not properly a part of the record in this cause and were not directed to be placed in the transcript by plaintiffs in error.

This record also discloses, in the motion for a new trial, filed by plaintiff in error O-W. R. & N. Co. that in another case involving the same transaction but for the recovery of the building, immediately following the case at bar the jury rendered a verdict for the defendants (printed transcript, pp. 125-126).

We call attention to this latter fact simply because of the appearance in the record of the verdict in the former trial of the case at bar.

In conclusion we submit that upon principle and under the authorities plaintiffs in error are entitled to a judgment of reversal in this cause.

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NORTHERN PACIFIC RAILWAY COMPANY, a corporation, and OREGON-WASHINGTON RAILROAD & NAVIGATION COMPANY, a corporation, *Plaintiffs in Error*, vs. CYRUS A. MENTZER, *Defendant in Error.*	No. 2298.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF DEFENDANT IN ERROR

STATEMENT.

This action was brought by the defendant in error against the plaintiffs in error for the burning, by the plaintiffs in error, of a certain sawmill owned by defendant in error, located near the right-of-way of the Northern Pacific Railway Company at or near

South Tacoma, Washington, said fire being caused by sparks emitting from one of the engines of the plaintiffs in error, caused by the defective condition or negligent operation of the said engine. Defendant in error has introduced evidence on all points to constitute a cause of action against the plaintiffs in error, to-wit:

That on the morning of the 15th day of July, 1911, a freight train of the Oregon-Washington Railroad & Navigation Company left the depot at South Tacoma in the direction of the mill of the defendant in error, which is located but a few blocks beyond the said depot, laboring harder than trains usually do in passing that direction (Record, 67, 69, 70).

That between the said depot and the said mill, and for some distance beyond the said mill, the railroad passes over an up-grade (Record, 12).

That as the train of the Oregon-Washington Railroad & Navigation Company passed the mill of the defendant in error it was seen shooting up large sparks, going up higher than the mill and in the direction of the same (Record, 34, 36, 37).

That a short time after the said train passed by said mill a fire was discovered burning on top of the mill, and no fire at that time or until the mill was thoroughly ablaze, was there any fire seen on

or near the ground about said mill, or at the end of the mill nearest the mill boiler (Record, 23, 35, 41).

That the floor of the mill had been sprinkled about six o'clock on the night of July 14, 1911, by employes of the defendant in error, and the fire in the engine of said mill was extinguished about six o'clock on the same day, and no fire was in the engine of said mill after that time (Record, 12, 14).

That about one o'clock on the morning of the 15th day of July, 1911, one John Horn, who owned the shingle mill in the south part of said mill, passed through said building and about the same, and no fire or evidence of fire was seen anywhere about (Record, 14).

That on the morning of the 15th day of July, 1911, the wind, though not strong, was blowing in the direction of the mill from and across said railway tracks (Record, 24).

That other fires had been set by sparks from the engines of the plaintiffs in error in this same vicinity, and within thirty days prior to the setting of this fire (Record, 15, 17, 25, 30, 32, 33).

That no other adequate cause of the fire was attempted to be shown by the plaintiffs in error.

That the property burned was of the reasonable

value of $3,120.00, as found by the jury (Record, 12).

The statement of plaintiffs in error is mainly correct. There is only one instance in which we desire to make any particular correction. On page 8 of their brief they claim to have shown by *uncontradicted* testimony that there was no negligence in the operation of their trains or of the engines, fire apparatus or spark arresters, and that the same were all in perfect condition and properly constructed, and further say that the defendant in error did not introduce any evidence either in chief or in rebuttal to disprove these facts. These statements, we claim, are not borne out by the record. Plaintiff did introduce evidence to the effect that these trains in question did throw out an unusual amount of sparks and of unusual size (Record, 34, 36, 37), and defendants' own witnesses testified that if such sparks were emitted of the size and in the numbers claimed, then the spark arresting apparatus must have been in a defective condition (Record, 86 and 92). We will call the court's attention to this again in the argument on this phase of the question.

ARGUMENT.

The foregoing statement, which is borne out by the evidence, conclusively shows that some evi-

dence was introduced by the plaintiff on every point necessary to be proven by him sufficient to make a *prima facie* case for the plaintiff, and raise presumption that there was negligence on the part of the defendants, and when this is done it is the province of the jury and not of the court to decide whether the defendants' proof was sufficient to overcome this presumption. This being so, unless error has been committed by the court in admission of evidence, its instructions or otherwise, this verdict should stand. Did the court commit any errors in the trial of the case? We think the record does not show any such errors.

I.

Appellants contend in their argument "One" that the plaintiff having sued the defendants jointly upon one cause of action could not recover upon proof of distinct separate torts, one based upon the operation or construction of a particular engine of the Northern Pacific Railway Company, and one based upon a different claim of negligence in the operation or construction of an engine of the Oregon-Washington Railroad & Navigation Company, an entirely different engine and a different train, and at the close of the case moved for a directed verdict in the following language:

"The plaintiff having sued upon a joint cause of action alleged against both defendants, and having

proved, if it has proved anything, a separate act by each defendant is not entitled to maintain this action." Appellants' Brief, pages 23 and 24.

It is admitted, and was contended during the trial by both parties, and so taken by the court, that the defendant, Northern Pacific Railway Company, would be liable with the other defendant should the negligence of the other defendant have caused the fire, by reason of the fact of the Northern Pacific Railway Company's ownership of the road in question. This is clearly shown by the instructions of the court (Record, 112), and the requested instructions of the defendant, Oregon-Washington Railroad & Navigation Company (Record, 99, 100, 101), so that as to the verdict actually rendered in this cause on the evidence submitted and the judgment rendered thereon, both defendants were liable jointly for the proven negligence of the Oregon-Washington Railroad & Navigation Company. In the evidence introduced all of the occurrences surrounding the scene of the fire that might have any bearing on the origin of the same was allowed to be introduced by the court, and properly so. And appellants now insist (Brief, page 21), and did at the time of trial, that the fact of the Northern Pacific train going north should be taken into consideration by the jury in ascertaining the cause of the fire (Record, 103-4). The jury found that the evidence introduced by the plaintiff

and defendant was sufficient in their minds to show conclusively that the fire originated by sparks from the Oregon-Washington Railroad & Navigation Company's train, number 691, and the court, at their request, instructed the jury as above shown, to the effect that it would not be necessary for them to consider the negligence of the defendant, Oregon-Washington Railroad & Navigation Company, at all until they had first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company, further saying that if the fire was started in any other way, or if there was not a preponderance of evidence showing that it started from an engine of that company, then their verdict must be for the said defendant, Oregon-Washington Railroad & Navigation Company, and that it was not necessary for them to consider any other question in the case. Appellants speak many times through their brief of the plaintiff attempting to prove two distinct and independent torts. We understand the law to be that if two or more defendants are responsible legally for the act of one of them by reason of their relationship (of lessor and lessee in this case) it is proper to bring a joint action against them both.

C. B. & Q. R. R. Co. vs. Willard, 220 U. S. 413.

Heron vs. St. P. & M. M. Ry. Co., 71 N W. (Minn.) 706.

It is also true, as a matter of law, that when two companies are jointly or in any manner operating a railroad, and the negligent action of each contributes to the same injury, then they are both liable and may be sued jointly.

Matthews vs. Delaware L. & W. R. Co., 22 L. R. A. (N. J.) 261.

Cuddy vs. Horn, 46 Michigan 542, 41 American Rpts. 178.

Brown vs. Coxe Bros. & Co., 75 Federal 689.

Clinger vs. Chesapeake & O. R. Co., 15 L. R. A. ns. 998-1000.

Strauhal vs. Asiatic S. S. Co., 85 Pacific (Ore.) 230.

In this case all of the evidence went to show certainly that the Oregon-Washington Railroad & Navigation Company was guilty of such negligence, and under the general rules and the law of this case, both companies were liable therefor. There was also some evidence which went to show that the Northern Pacific Railway Company was also negligent in the construction and management of its engines, and if so and the fire was caused by the joint action of both companies in the management of this road, then again both companies would be liable and might be sued jointly, although one

was more negligent than the other, and no error could be predicated upon the introduction of any of such evidence. But the jury having found that the sole proximate cause of the fire was the negligent issue of sparks from the defendant, Oregon-Washington Railroad & Navigation Company's engine, and that by reason thereof it and its co-defendant were liable under the instructions of the court, the admission by the court of evidence as to the Northern Pacific Railway Company would be, if error at all, error without prejudice. The Northern Pacific Railway Company could not complain of the same because no verdict or judgment was based thereon against them. Its co-defendant, the Oregon-Washington Railroad & Navigation Company, could not predicate error upon the same for such evidence if the same became strong enough to indicate that the fire was caused by the engine of the Northern Pacific Railway Company rather than their own would be benefited thereby in proportion to the strength of such evidence.

II.

TESTIMONY AS TO OTHER FIRES.

Plaintiffs in error would have the court understand that the train sheet of the plaintiffs in error as introduced in evidence limited the proof of other fires to those set by a certain particular engine, but the record shows, page 11, that no at-

tempt was ever made to so limit the defendant in error to prove that a certain engine set this fire, and when no particular engine is designated as having set the fire, evidence of other fires set at other times by other engines is always admissible to show the negligent habits of the railroad company, and the possibility and consequent probability that some locomotive of the company set this particular fire.

This proposition of law is admitted by plaintiffs in error in their brief on page 27, but they claim that in this case there was a particular engine attempted to be proven, but the complaint does not show any allegation as to any particular engine, and the stipulation on page 11 of the record shows only that the train sheet was admitted showing all of the trains that passed the point where the fire occurred during that night and morning.

Plaintiffs in error cite the *Grand Trunk Railway Company vs. Richardson*, 91 U. S. 454 (23 Law Edition 356), and quote from said case to show that that case was not contrary to their contention, but there is another part of that case that they did not quote, which shows that the evidence there designated the particular engine more closely than in this case. In the same case, page 362, the court says:

"The third assignment of error is that the plaintiffs were allowed to prove, notwithstanding objection of the defendant, that at various times during the same summer before the fire occurred, some of the defendant's locomotives scattered fire when going past the mill and bridge without showing that either of those which the plaintiffs claimed communicated the fire was among the number, and without showing that the locomotives were similar in their make, their state of repair and management to those claimed to have caused the fire complained of."

The court still held that the evidence was admissible, and in a statement of the case by the court, on page 358, we find the following:

"The plaintiff's testimony tended to show that the fire originated from one of two locomotive engines belonging to the defendant, the first hauling a passenger train westerly past plaintiff's mill about half past one in the afternoon, and the other hauling a freight train easterly past the mill about four o'clock in the same afternoon."

So we see in that case the plaintiff's evidence more definitely established the particular engine than was attempted to in this case.

We further desire to call the court's attention to the decision of this court in *Northern Pacific Railway Company vs. Lewis, et al.*, 51 Federal 658, where this question was passed upon by this court, and reference therein made to the above cited case, *Railway Company vs. Richardson*, this court saying:

"It is assigned as error that the court permitted evidence of other fires set at other points on the road, and at other times and by other engines, and instructed the jury to take into consideration the fires so set in determining the question of negligence. The complaint did not designate the particular engines which were claimed to have caused the fire. The testimony, however, tended to show that the fire originated from one of two certain locomotives, and that these and other locomotives had set other fires, both before and after the injury complained of. This evidence was clearly admissible under the authority of the decision in the case of *Railway Company vs. Richardson*, 91 U. S. 454, as 'tending to prove the possibility and consequent probability that some locomotive caused the fire, and as tending to show the negligent habit of the officers and agents of the Railway Company.'"

From the above we see that both the Supreme Court of the United States and this Court have held that evidence of other fires was admissible in cases stronger against the proposition than the case at bar.

To the same effect see:

Campbell vs. Mo. Pac. Ry. Co., 42 A. S. R. (Mo.) 530 (535).

Koontz vs. O. R. & N. Co., 20 Or. 3.

III.

INSTRUCTIONS AS TO OTHER FIRES REFUSED.

By the instruction complained of, plaintiffs in error asked the court to take from the jury all

consideration of other fires on the ground that on cross-examination of the plaintiffs' witnesses they had shown that there was no evidence to connect the Oregon-Washington Railroad & Navigation Company's engines in the setting of such fires.

An examination of the record shows that it became a question for the jury on the evidence submitted as to whether they had destroyed the effect of the evidence in chief as to evidence of other fires by said defendant. The court, instead of taking it from the jury entirely, did instruct them, and properly so as far as the evidence would warrant (Record, 117), where the court instructed the jury as follows:

"In this case there was some evidence admitted concerning other fires set within thirty days previous to the fire in question. You will understand that unless there is some evidence to show that those fires were set by engines of the Oregon-Washington R. & N. Company, you will not consider that evidence as in any way affecting that company, unless, as I say, there is evidence to show that those fires were set by the engines of that company, or some of them."

IV.

REQUESTED INSTRUCTIONS NUMBERS 16 AND 17 WERE PROPERLY REFUSED.

These instructions were asking the jury to consider the fact that the Northern Pacific Railway

Company's train going north, as shown by the train sheet, was a circumstance to be considered by them in ascertaining the cause of the fire. This is possibly true, and the evidence was before the jury for them to consider, it was mentioned by all counsel in the argument and the court covered the same so far as it was necessary in its instruction to the jury to the effect that if the fire was started:

"In any other way, then, their verdict must be for the defendant, Oregon-Washington Railroad & Navigation Company, and this was all the defendants could ask."

The instruction so given is found in Record, page 114, and is as follows:

"It will not be necessary for you to consider the negligence of the defendant the Oregon-Washington Railroad & Navigation Company at all until you have first determined the manner in which the fire started, and that it was started by a spark or sparks thrown off by an engine of that company. If the fire started *in any other way*, or if there is not a preponderance of evidence showing that it started from an egine of this company, then your verdict must be for the defendant, the Oregon-Washington Railroad & Navigation Company, and it is not necessary for you to consider any other question in the case, and you will return a verdict for the defendant, the Oregon-Washington Railroad & Navigation Company."

V.

REFUSAL OF INSTRUCTIONS NUMBERED 18 AND 19 ASKED BY DEFENDANT.

These instructions were properly refused because courts have held repeatedly that this is purely a question for the jury and not for the court, the following case being squarely in point and there sustaining the court in refusing to give these instructions.

McCullen vs. Chicago & N. W. Ry. Co., 101 Federal 366.

Aspland vs. Great Northern Ry. Co., 63 Wash. 164.

Halley vs. Sumter Valley Ry. Co. (Ore)., 12 L. R. A. New Series 526.

These instructions were further properly refused for the reason that witnesses for the defendant in error testified, without contradiction, that a spark falling in dust and sawdust such as accumulated on this building, might smolder several hours before bursting into flame (Record, 93 and 95).

VI.

INSUFFICIENCY OF EVIDENCE.

The only question not heretofore covered is the objection to the verdict and judgment on account of the insufficiency of the evidence. In our pre-

liminary statement, which is borne out by the records we have shown, and plaintiffs in error in their brief admit the same, that their train, which the jury found caused the fire, did pass the mill in question in the morning some short time before the fire was discovered. That their witnesses and ours testified that it was laboring harder than trains usually do in going out of the station at South Tacoma within a few blocks of the mill. One witness testified that as it went by the mill it emitted an unusual number of extraordinarily large sparks, some of them varying from the size of a lead pencil to a dime. That the wind was a slight breeze blowing the sparks in the direction of the mill. That within twenty minutes to half an hour after the passing of said train, the fire was first discovered on the roof of the mill, and that no fire at that time was underneath in the body of the mill, or on the ground, and that no other adequate cause was shown for the origin of said fire. Under this evidence the plaintiff would be entitled to a verdict for the value of the property destroyed owned by him, should the jury believe the same, even without considering the evidence as to the Oregon-Washington Railroad & Navigation Company's trains setting other fires previous to this one. This being the case, it was the duty of the court to give

the same to the jury no matter what the evidence of the defendants might have been.

The only correction or objection that we have to make to the statement of the plaintiffs in error under this branch of the argument is their contention on page 39 of their brief that there was no testimony in rebuttal or otherwise to show that their spark arresters were not in perfect condition, and that they were not negligently operated, claiming that by reason of there being positive and uncontradicted testimony that their spark arresters were of the most approved pattern in general use, and were in good condition of repair, was conclusive even though there might be some evidence of negligence.

In the first place, plaintiffs in error are mistaken in saying that such evidence was uncontradicted, for the witness Ebert testified that the Oregon-Washington Railroad & Navigation Company, which the jury found set the fire, was emitting an unusual number of sparks, some of them as large as a dime, and that the said engine was working hard (Record, 34 and 36). Plaintiffs in error's own witnesses, Zintz and Perley, testified that with this condition of affairs, so testified to by Ebert as existing, the netting must have been out of repair, and there must have been holes therein large enough for these sparks to escape (Record, Zintz 36,

Perley 92). This being the case, the jury had a right to believe Ebert, and also to believe Zintz and Perley; and if they did so believe, the evidence justified them in returning the verdict complained of.

In the second place, we do not admit the legal contention of plaintiffs in error that their positive evidence that the spark arrester was the most approved in general use, and was in good condition and repair is conclusive. Our contention being that the law is that, when the plaintiffs in a case of this kind show by evidence that sparks of unusual size and number were emitted by the defendants' engines, and that other fires were set by engines of the same company, or any other evidence of like nature, that there then arises such a presumption of negligence that, though the defendant companies' officers and agents do testify that their spark arresting apparatus was of the most approved form in general use, and in perfect condition, the jury are not compelled to believe them, but have a right to consider their evidence in connection with all other evidence on the same question, and render such decision as to them seems justified by the whole evidence. To this effect see

Toledo, St. Louis & W. Ry. Co. vs. Star Flouring Mill, 146 Federal 953.

This was an action against the railway company for loss by fire caused by shooting sparks from the defendants' locomotive. The only question to be considered was whether the spark arrester device was in good condition upon the day when the fire was started. The jury found that it was not.

In this case there was substantial uncontradicted evidence that the netting of this particular engine which it was alleged set the fire had been replaced by new netting thirty days before the fire, and that the average life of such netting was from six to eight months. The servants of the railway company testified that this netting was inspected on the night before the fire, and again within half an hour after the fire, and found to be in good condition.

The plaintiff introduced in rebuttal evidence that other fires had been set along the right-of-way by this locomotive, and the court held: The jury were not bound to accept the evidence of the inspector and other servants of the defendant as to the condition of the spark arrester as conclusive, but could weigh this testimony with other testimony introduced in the case.

Burke vs. Louisville & Nashville Ry. Co., 19 American Rpts. 618.

Here was another case where the railway company were accused of negligence in allowing sparks

to be emitted from the smokestacks of their engines which set on fire the home of the plaintiff. The train passed about 9:40 p. m., and some time after 10:00 o'clock the house was found burning. It was shown that when the trains passed this neighborhood they were shooting sparks. The defendants showed that on this night their spark arresters were in good condition, and were not emitting an unusual quantity of sparks.

The inspector testified that on the same evening before the two engines which were alleged to have set the fire left the yards he had carefully inspected the smokestack of each, and both were found to be in perfect order. That the locomotives used at that time by the defendants were of the best and most approved class, and the witnesses testified for the defendants that with these properly constructed spark arresters the engines could not throw out sparks large enough to do damage.

Yet this case was submitted to the jury, who returned a verdict in favor of the plaintiff, and, although a new trial was granted, it was on an entirely different matter, and this question of the sufficiency of the evidence was held to be a matter for the consideration and determination of the jury.

Plaintiffs in error further complain that too long a time elapsed between the passing of the train found to have set the fire and the time of the dis-

covery of the fire. This time, according to their witnesses, was some two hours, but according to the defendant in error's witnesses, was from twenty minutes to half an hour. Of course, plaintiffs in error claim that the evidence showing so short a time was merely guess work, but the jury are the judges of the weight and credibility of the evidence submitted. But even though it should be true that it was two hours or more after the passing of their train, yet, in view of the circumstances surrounding the setting of the fire and the evidence of the witnesses, Fettig and Doud, to the effect that sparks might fall in sawdust such as accumulated on the roof of this mill, and smolder there for several hours before bursting into flame, this lapse of time was only one element to be considered by the jury in arriving at the proximate cause of the fire, and the authorities are numerous to that effect. To the same effect see:

13 American and English Encyclopedia of Law, Second Edition, 442-493.

Abrams vs. Seattle & Montana Ry. Co., 27 Wash. 507.

This was an action against the Seattle & Montana Ry. Co. for value of a barn, some hay and certain farming utensils destroyed on the 10th day of October, 1896. The evidence showed that a train passed the premises at 11:57 a. m. Between

an hour and an hour and a half after this time smoke was seen arising out of the comb of the roof of the barn at the end nearest the railway track, followed by flames, which afterwards consumed the building.

In this case the jury found for the plaintiff, and in passing upon the sufficiency of the evidence the Supreme Court said:

"The courts of this country in this class of cases, while adhering to the rule that some act of negligence on the part of the railway company must be averred and proven in order to warrant a recovery, yet have been extremely liberal when called upon to pass upon the evidence which a jury has found sufficient," citing *Union Pacific Railway Co. vs. De Bus*, 12 Colorado 294; also 66 Wisconsin 161 (28 N. W. 170).

Wick vs. Tacoma Eastern Ry. Co., 40 Washington 408.

This was an action brought to recover damages for the damage of personal property by the Tacoma Eastern Railway Company, claiming plaintiff had wholly failed to prove the origin of the fire. The court held: "While we agree with the counsel for appellant that in cases such as this the origin of the fire must be established to a reasonable certainty, but under this rule we would not be warranted in interfering with the verdict."

Halley vs. Sumter Valley Co. (Ore.), 12 L. R. A. ns. 526.

In this case the trains of the defendant ran by the property about 9:30 or 10:00 o'clock in the morning, which were seen shooting up sparks. Nothing further was noticed until between 12:00 and 1:00 o'clock, when the fire was first noticed.

In appealing from a verdict and judgment of the plaintiff, the court said:

"The inference in this case may not be strong, but is some evidence, and we at least think it creates a probability that the defendant's engines caused the fire,"

and refused to interfere with the verdict of the jury.

Aspland vs. Great Northern Ry. Co., 63 Washington 164.

An action for destruction of certain cordwood of the plaintiff by fire emitted by the defendants' engines. In this case an engine passed the plaintiff's property at 3:15 o'clock in the morning, and the fire was first seen about 4:24 o'clock in the morning.

Evidence in this case was introduced showing that fire was repeatedly set by the defendants' trains. To rebut this the defendants showed that its engines were in proper working order, but the court held that this was only rebuttal evidence,

the sufficiency of which was a question for the jury and not for the court, and refused to set aside a verdict in favor of the plaintiff.

There is another consideration in this case which should cause this court to hesitate in interfering with the judgment rendered herein. This case has been tried upon the same evidence before two juries, and each jury has found for the plaintiff, and when twenty-four men have agreed that the plaintiff in error, the Oregon-Washington Railroad & Navigation Company, was negligent as alleged in the complaint of the defendant in error, this court, as was said in *McCullen vs. Chicago & N. W. Railway Co.*, "would be perhaps justified in regarding that test as conclusive" (Record, 7 and 8).

In conclusion, it now appearing from the records in this case that the jury were justified in finding their verdict under the evidence submitted, and that the court committed no error in the trial of this case, we ask this court to sustain the judgment of the lower court, and refuse to grant a new trial.

Respectfully submitted,

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